

No. 3550

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. E. YOUNG,

Plaintiff in Error,

vs.

CALIFORNIA STATE BOARD OF PHARMACY, et al.,

Defendants in Error.

Upon Writ of Error to the Southern Division of the United States
District Court of the Northern District of California,
Second Division.

BRIEF FOR PLAINTIFF IN ERROR.

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FILED

MAY 26 1904

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BRIEF FOR PLAINTIFF IN ERROR.

This writ of error is to review the judgment of the Court below dismissing the action after an order sustaining the demurrers to the original complaint, an order sustaining demurrers to an amended complaint, and an order denying the motion for leave to file a second amended complaint.

Statement of the Case.

FACTS.

The plaintiff in error alleges that he is the owner of and entitled to the possession of certain goods

which were consigned to him and his former partner. That the goods consisted of morphine, opium and cocaine. That he has secured all the rights of his former partner in and to the goods. That said goods were *in transitu* in interstate and foreign commerce from the United States to the Republic of Mexico. That the defendants in error interfered with said goods while in such transit. That plaintiff in error made demand upon said defendants in error for the goods. That at the time of the demand said defendants in error had said goods “wrongfully, unlawfully and illegally” in their possession. That defendants failed and refused to comply with said demand. That the failing and refusing to comply with said demand was wilfull and malicious, and without just cause or provocation therefor, and that the defendants in error “still wilfully and maliciously, and without just cause or provocation therefor, fail and refuse to deliver the possession of said property to plaintiff”, and that it is without the consent of plaintiff, and “for the purpose of harassing, annoying and oppressing said plaintiff”. That he has suffered damages thereby. That he is entitled to punitive damages.

Specifications of Error.

I.

The Court erred in sustaining the demurrer of the said defendant, California State Board of

Pharmacy, and of the defendants, Off, McKown, Finger, Molony, O'Callaghan, Meader and Lindley, the present members constituting said defendant board, to the complaint of plaintiff.

II.

The Court erred in not overruling the demurrer of the defendant, California State Board of Pharmacy, and of the defendants, Off, McKown, Finger, Molony, O'Callaghan, Meader and Lindley, the present members constituting said defendant board, to the complaint of plaintiff.

III.

The Court erred in sustaining the demurrer of the defendant, Off, as an individual, to the complaint of plaintiff.

IV.

The Court erred in not overruling the demurrer of the defendant, Off, as an individual, to the complaint of plaintiff.

V.

The Court erred in sustaining the demurrer of the defendant, California State Board of Pharmacy, and of the defendants, Off, McKown, Finger, Molony, O'Callaghan, Meader and Lindley, the present members constituting said defendant board, to the amended complaint of plaintiff.

VI.

The Court erred in sustaining the demurrer of the defendant, Off, as an individual, to the amended complaint of plaintiff.

VII.

The Court erred in not overruling the demurrer of the defendant, California State Board of Pharmacy, and of the defendants, Off, McKown, Finger, Molony, O'Callaghan, Meader and Lindley, the present members constituting said defendant board, to the amended complaint of plaintiff.

VIII.

The Court erred in not overruling the demurrer of the defendant, Off, as an individual, to the amended complaint of plaintiff.

IX.

The Court erred in denying the motion of plaintiff for leave to file his second amended complaint.

X.

The Court erred in not granting the motion of plaintiff for leave to file his second amended complaint.

XI.

The Court erred in ordering the above-entitled action be dismissed.

XII.

The Court erred in ordering judgment of dismissal be entered in the above-entitled action.

XIII.

The Court erred in its judgment of dismissal in the above-entitled action.

Argument.

I.

**ORIGINAL COMPLAINT NOT SUBJECT TO ATTACK ON GROUND
OF THE BAR OF THE STATUTE BY REASON OF INSUF-
FICIENT OBJECTION ON THAT GROUND.**

As to the original complaint the Court in its opinion (Supp. Tr. pp. 20-22) overruled all grounds in the demurrers, except what was called the ground of the bar of the statute of limitations.

Paragraph "VI" of the demurrer of Off (Supp. Tr. p. 14) is as follows:

"That said complaint and the cause of action therein attempted to be stated is barred by the statute of limitations."

It does not need citation to this Court to show that such a statement of a ground setting forth an alleged bar of a statute is wholly insufficient. Under present day pleading, what statute is meant? Under the California law there are many statutes of limitations set forth in the Code of Civil Procedure of California, which no doubt this Court is

entirely familiar with. No section or subdivision of a particular statute is set as required. The demurrer should not have been sustained on that pleading of a statute.

Paragraph "V" of the demurrer of the board and members (Supp. Tr. p. 17) is as follows:

"That the complaint does not state facts sufficient to constitute a cause of action against said defendants, or any of them, in this, that the alleged cause of action appears to be barred by the provisions of section 338, subdivision 3, of the Code of Civil Procedure of the State of California."

Does this quoted paragraph attempt to set forth "want of facts" or "the bar of the statute"? Under present day pleading, who ever heard of a complaint being defective for "want of facts" because "the alleged cause of action appears to be barred" by any section or subdivision of any section.

It is elemental that a pleading is to be taken most strongly against the pleader. Here the pleader has stated a "want of facts" exists by reason of the alleged bar. The paragraph means nothing in legal contemplation. The Court found that sufficient facts were alleged to state a cause of action. (Supp. Tr. pp. 21-22.) This demurrer should have been overruled.

II.

THE PLAINTIFF IN ERROR A CITIZEN OF ARIZONA.

As stated to the Court by counsel for plaintiff in error on the argument, the plaintiff in error was at the time of the filing of the original complaint a citizen of Arizona, but was compelled to reside temporarily in Calexico, California, for the purpose of attending the retrial of the cases in which the Supreme Court of the United States reversed the judgments.

The verification to the complaint (Supp. Tr. p. 12) says that "plaintiff resides in the City of Calexico", but does not say he is a citizen of California.

The verification to the amended complaint (Tr. p. 6) avers "that plaintiff is a citizen of Arizona".

The proposed second amended complaint sets forth in paragraph "III" (Tr. p. 22) "that the above-named plaintiff is a citizen of the State of Arizona". Also the verification (Tr. p. 26).

 III.

STATUTE UNDER WHICH PROCEEDING IS BROUGHT.

Section 1979 of the Revised Statutes of the United States provides:

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof,

to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured, and an action at law, suit in equity, or other proper proceeding."

With reference to this statute, it has been said:

"This is as comprehensive as it is explicit. It applies to any person, no matter who, officer or layman, who, under color of any law, statute, etc., of any state, shall, subject, or cause to be subjected, any person within the whole jurisdiction of the federal government to the deprivation of any right, privilege, or immunity secured by the constitution, and declares that he shall, notwithstanding any law, statute, regulation, etc., of the state, be liable to the party aggrieved in any action at law, suit in equity, or such other proper proceeding for the redress. And it throws wide open the doors of the federal courts as the altar of justice for his refuge."

Tuchman v. Welsh, 42 Fed. Rep. 558.

IV.

DEPRIVATION UNDER COLOR OF STATE STATUTE.

It is alleged that defendants in error acted under a statute of California, and particularly under Section 8 thereof (Supp. Tr. pp. 5-6).

V.

PROSECUTIONS UNDER STATE STATUTE.

As set forth in the original complaint in paragraphs "VIII", "IX" and "X" (Supp. Tr. pp.

6-9), there were three trials on three separate charges and one retrial. In paragraph "VIII", on the retrial, the charge against McGinis, the former partner of plaintiff in error, was *dismissed by the prosecution*, and the plaintiff in error *acquitted by the jury* of the charge of having unlawfully the particular drug in his possession in the State of California. This happened on the 9th day of June, 1919. In paragraph "IX", on the retrial, the charge was *dismissed by the prosecution* against both. This happened on the 10th day of June, 1919. In paragraph "X", the jury disagreed on the trial on May 15, 1915, and on April 14, 1919, the charge against both *was dismissed for want of prosecution*. This was almost a year after the reversal of the judgments in the first two cases by the Supreme Court.

Clearly from then on the plaintiff in error, being the sole owner of the goods, was entitled to have the goods restored to interstate and foreign commerce. But why the refusal of the defendants in error so to do? Will they answer why? Not an evasive or technical answer, but one stating the absolute fact. Such questions are prompted by the question put to counsel from the bench on the argument: "Do you know what has become of the goods?" The Court will remember that counsel replied: "I have never been able to find out. No one connected with the other side of the case will fully inform me. There seems to be an air of mystery about the whole affair."

VI.

COURT'S OPINION ON DEMURRER TO AMENDED COMPLAINT.

The first paragraph of the trial Court's opinion (Tr. p. 18) says in part:

“certain poisonous drugs *found* in the possession of the plaintiff and his assignor” (*Italics ours*).

From a careful reading of the pleadings on the part of plaintiff in error it will be seen that nowhere does it appear that any drugs were *found* in the possession of the plaintiff or his assignor. The contention of the plaintiff in error and his assignor has been throughout their trying experiences that neither at any time had any part of the shipment in their possession.

Further, the opinion states that “there being no diversity of citizenship” set out in the amended complaint.

Further, the opinion states that “there is no allegation that at the time of such demand they were illegally in their possession”, that is, the defendants' possession.

Now both of these objections were overcome in the proposed second amended complaint, paragraphs III and IV (Tr. p. 22) setting forth the diversity of citizenship, and paragraph VI (Tr. p. 22) setting forth that at the time of the demand for a portion of the goods, such portion was “wrongfully, unlawfully and illegally” in the possession of the defendants, and paragraph VI of the second

count (Tr. pp. 24-25) setting forth the same state of affairs as to the remaining portion of the goods.

Paragraphs III and IV set forth the diversity of citizenship in the second count (Tr. p. 24).

VII.

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT.

The plaintiff in error duly served and filed his notice of motion for leave to file his second amended complaint, accompanied by his proposed second amended complaint (Tr. pp. 19-27).

On the hearing of the said motion, the defendants in error served and filed the "affidavit of Louis Zeh" (Tr. pp. 28-32). Certainly such an affidavit was not proper on such a motion. Whatever other actions had been taken could have no bearing upon the question.

The motion should have been granted.

It has been said:

"Though the record cannot be amended here, it is possible, in the disposition that we make of this case, that it may be amended in the court below, * * *."

Yeandle v. Penn. R. Co., 169 Fed. Rep. 942.

"It will be for the court below to determine whether the pleading can be so amended as to present a case within its jurisdiction."

Metcalf v. Watertown, 128 U. S. 590.

The second amended complaint sought to be filed follows the opinion of the Court below on sustaining the demurrer to the first amended complaint.

We respectfully submit that the judgment should be reversed and the cause remanded with instructions to permit the filing of the second amended complaint.

Dated, San Francisco,
November 20, 1920.

Respectfully submitted,

WILLIAM SEA, JR.,
Attorney for Plaintiff in Error.